SUPREME COURT, U. S.

JUN 30 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 314

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

EARL N. BRYAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EARL N. BRYAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 3, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 375 F.2d 155. It is printed in the Appendix hereto, beginning at p. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1967. App., p. 7a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a derailed locomotive, found by the court below to be "gutted by fire" and "inoperative," was being "used" "in . . . active service" on petitioner's "line," within the meaning of Section 2 of the Boiler Inspection Act of 1911, 45 U.S.C. § 23.

2. Whether the trial court unlawfully deprived petitioner of its right of trial by jury by directing a verdict against it on the disputed factual issues of violation and proximate cause.

STATUTES INVOLVED

The principal statute involved is Section 2 of the Boiler Inspection Act of 1911, 36 Stat. 913, as amended, 45 U.S.C. § 23. Also involved are Sections 2 and 4 of the Safety Appliance Act of 1910, 36 Stat. 298-99, 45 U.S.C. §§ 11, 13. Each of these statutes is printed in the Appendix hereto, beginning at p. 1a.

STATEMENT

On November 8, 1962, the locomotive and several cars of petitioner's passenger train known as "The Southerner" were involved in a crossing collision near Eastaboga, Alabama, derailed, and overturned. The locomotive came to rest on its side. It was gutted by fire and inoperable as a locomotive. Respondent Bryan, a carman, was a member of a crew sent to rerail the locomotive so that it could be taken to the repair shops. The

crew had two boom cars with which to lift the wrecked equipment back onto the track. Cables from the boom cars were attached by means of a clevis to a lifting eye or metal bracket on each end of the locomotive, so that the crane of one such car would be lifting the front of the locomotive while the crane of the other was lifting the back. Respondent attached one of the cables to the lifting eye on the back end of the locomotive. He then went to the other side of one of the boom cars to watch its wheels, in order to make certain that its wheels did not raise up off the tracks during the lifting operation. This lifting could be done in one of two ways: either by picking up the cables, or by raising up on the booms of the derricks. The latter method, called "booming," was used on this occasion. The rear lifting eye broke while the locomotive was being lifted, the loosened cable backlashed, and a piece of its attaching apparatus struck the respondent Bryan.

Respondent brought this action against Southern in the United States District Court for the Northern District of Georgia. His complaint was in two counts, one alleging a violation of the Boiler Inspection Act of 1911, 45 U.S.C. § 23, and the other alleging negligence under the Federal Employers' Liability Act, 45 U.S.C. § 51. The case was extensively tried before a jury. Among the disputed factual issues were whether the gutted locomotive was being "used . . . in active service" on petitioner's "line," in order to bring the case within the liability-without-fault provisions of the Boiler Inspection Act, and whether respondent's injuries were proximately caused by a defect in the locomotive's lifting eye, or by improper "booming." At the close of the evidence the negligence count was withdrawn, and each side moved for a directed verdict

on the Boiler Inspection Act count. Respondent's motion was granted, and petitioner's denied. The jury was instructed that Southern was liable as a matter of law, and only the question of damages was submitted to them. The judgment entered on their verdict was affirmed by the court below.

REASONS FOR GRANTING THE WRIT

The Boiler Inspection Act, enacted in 1911, provides, in pertinent part:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life and limb . . . ."

As this Court explained in *Lilly* v. *Grand Trunk W.R.R.*, 317 U.S. 481 (1943), the liability created by this statute does not depend on negligence or any kind of fault. If the conditions of the statute's applicability are met, and if a violation has proximately caused injury, then the carrier involved must respond in damages, no matter how reasonable or careful its conduct may have been. Precisely because the liability at stake here is absolute, the statute must be carefully construed to ascertain the circumstances under which Congress wished to change the general rule of liability for negligence only. The statute plainly provides that there can be no liability unless three distinct requirements are met: (1) the locomotive must have been "used" by Southern; (2) this use must have been "on its (Southern's) line"; (3) this use must have been "in the active service" of Southern.

Further, the Boiler Inspection Act must be carefully distinguished from the broader and more generally applicable Safety Appliance Act. The latter statute is not limited to "use." It forbids, in Section 2, 45 U.S.C. § 11, any carrier "to haul, or permit to be hauled or used on its line, any car" not equipped as required by law. Not only use, but also hauling, may violate the Safety Appliance Act. That act, moreover, applies to "cars," and not, as in the case of the Boiler Inspection Act, to "locomotives" alone. And finally, the Safety Appliance Act says nothing about "active service." The contrasting language of that statute, which was already on the books when the Boiler Inspection Act became law, thus illuminates how narrowly Congress has circumscribed the latter enactment. A car which is being "hauled" may, without more, violate the Safety Appliance Act. Not so of locomotives. Even if the locomotive here involved was being "hauled" at the time of the accident, the judgment below is in error. In order for respondent to prevail, the locomotive must have been "used," and, beyond that, it must have been "in the active service of" Southern.

With this indisputable statutory background in mind, a moment's reflection is sufficient to show that the court below manifestly erred. A locomotive that is, in the Court of Appeals' own words, "gutted by fire to the extent that it was inoperative as a locomotive" (App., p. 4a *infra*), cannot be in use. Nor can it be in active service. Its condition is the very antithesis of use or service. Indeed, it may be doubted whether such a mass of metal may properly be called a "locomotive" at all.[1] It is difficult to imagine facts that more clearly

[1] Further, it is at least doubtful that the lifting eye, which is never used when the locomotive is "in active service," is a "part or appurtenance" within the meaning of the Boiler Inspection Act. *Cf.* Southern Ry v. Lunsford, 297 U.S. 398 (1936).

fail to satisfy the provisions of the Boiler Inspection Act. Southern's motion for directed verdict should have been granted. The Court of Appeals' failure so to rule was apparently attributable to its confusion of the Boiler Inspection Act with the Safety Appliance Act. Both of the cases cited in the crucial portion of its opinion, *Texas & P. Ry.* v. *Rigsby,* 241 U.S. 33 (1916), *affirming* 222 Fed. 221 (5th Cir. 1915), and *McCalmont* v. *Pennsylvania R.R.,* 283 Fed. 736 (6th Cir. 1922), *cert. denied,* 260 U.S. 751 (1923), arose under the Safety Appliance Act, which, to repeat, has nothing to do with this case. The distinction between the two statutes is nowhere made clearer than in the Court of Appeals' opinion in *Rigsby* itself:

> "The hauling of . . . a car over the line of . . . a carrier is within the prohibition of the (Safety Appliance Act) . . ., though that movement does not constitute a use of the car . . . ." 222 Fed. at 222.

That the decision below was wrong is not, petitioner realizes, always a sufficient reason, of itself, to justify a claim upon this Court's limited time. But here the error is so plain, and the corpus of federal railroad law which it distorts so central to the public interest in a sound transportation system, that an exercise of informed discretion will surely lead to a grant of certiorari. There are, in addition, two particularly compelling reasons for such action: a clear conflict between circuits, and a violation of the cherished right of trial by jury.

A. The Decision Below Conflicts With Two Decisions of Another Circuit

The decision below is in direct conflict with two decisions of the Seventh Circuit under the Boiler Inspec-

tion Act. In the first, *Lyle* v. *Atchison, T. & S.F. Ry.*, 177 F.2d 221 (7th Cir. 1949), *cert. denied,* 339 U.S. 913 (1950), a locomotive had completed its run and was being cleaned and serviced by plaintiff, a hostler's helper. After finishing his work, plaintiff was climbing down a ladder on the side of the locomotive. He slipped and was injured. Violation of the Boiler Inspection Act was claimed on the ground that the locomotive's ladder was wet or oily. The Court of Appeals held, as a matter of law, that the locomotive was not in use at the time of the accident, and that the trial court should have directed a verdict in favor of the carrier. The court said, in language applicable here:

> "Liability under the Act in question . . . depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, . . . in consideration of the unconditional duty to have . . . locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, likewise limited the absolute liability to . . . locomotives while in use 'on the line.' . . .
>
> "The simple question is, was the locomotive in use? To that question, we think, there can be but one answer. Clearly the use of the engine in transportation had for the time being been abandoned; its use in commerce had come to an end. . . . To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it. To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation." 177 F.2d at 222-23.

To the same effect is *Tisneros* v. *Chicago & N.W. Ry.*, 197 F.2d 466 (7th Cir.), *cert. denied,* 344 U.S. 885 (1952), also an action under the Boiler Inspection Act.

There, an employee servicing an idle and inactive locomotive slipped and fell from an icy rung on its side. As in *Lyle*, the Court of Appeals held that a verdict should have been directed for the railroad. The opinion pointed out that "the locomotive . . . had ended its service trip"; that the "engineer and fireman had left"; and that "the engine (was) idle and not in operation." 197 F.2d at 467. Such a locomotive, it was held, could not be in use, as required by the Act.

The standard applied by the Seventh Circuit in *Lyle* and *Tisneros* is wholly incompatible with that applied by the Fifth Circuit in this case. The repair operations being performed in those cases were just as much "integral parts" of the "use" of a locomotive as getting the locomotive back on the track was in this case. The truth is that placing an unusable locomotive back on a track, so that its lifeless hulk can be dragged to a place of repair, is a lot farther from being "use . . . in active service" than were the routine repair and servicing operations involved in *Lyle* and *Tisneros*. If there is a difference between those cases and this one, it is that the instant case is an even clearer instance of the inapplicability of the Boiler Inspection Act.

Certiorari should be granted to resolve this conflict between the Fifth and Seventh Circuits.

B. The Decision Below Deprives Petitioner of Its Right of Trial by Jury on the Disputed Factual Issues of Violation and Proximate Cause

Even if the issue of "use . . . in active service" were not so clear, and even if the District Court did not err in refusing to direct a verdict for Southern, the judgment below is still seriously in error. For the trial court did not simply permit the jury to consider the facts and return a verdict for respondent. It di-

rected a verdict for respondent, who had the burden of proof, on the important substantive issues of violation of the Boiler Inspection Act and proximate cause. Petitioner is at the very least entitled to a new trial at which these issues may be passed on by a jury.

There was a sharp conflict in the evidence on these points. Respondent himself testified that "booming," the method used to raise the locomotive, was improper, and that the use of this method was what caused the lifting eye to break (R. 74, 75, 126-27). He further testified that there was nothing wrong or defective about the lifting eye (R. 85). On his own testimony, therefore, there was at least an issue of fact as to whether the locomotive was "safe to operate," and as to what proximately caused his injuries. Even if the primary, historical facts were clear and undisputed, there was still a real dispute as to the inference to be drawn therefrom.

Such questions are for the jury, in Boiler Inspection Act cases as in others. *See, e.g., Anderson* v. *Baltimore & O.R.R.*, 96 F.2d 796, 798 (2d Cir. 1938); *cf. Great Northern Ry.* v. *Otos*, 239 U.S. 349 (1915) (Holmes, J.) (proximate cause is for the jury in Safety Appliance Act cases). The case cited by the court below to justify withdrawal of these issues from the jury, *Givens* v. *Missouri-Kansas-Texas R.R.*, 195 F.2d 225, *mandate amended*, 196 F.2d 905 (5th Cir. 1952), is actually to the contrary. There was no question of improper operation there, as there is here. And the issue of proximate cause did go to the jury.

This is not simply a question of fact, unworthy of this Court's time and attention. Trial by jury is guaranteed by the Seventh Amendment and is an integral

part of the federal scheme of railroad-employee regulation. This Court has been alert to protect this right. It has been particularly vigilant to do so in litigation between railroads and their employees. As the Court said in *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957):

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 3, 1967.

APPENDIX

Statutes Involved

§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

§ 11. Safety appliances required for each car; when hand brakes may be omitted

It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, § 2, 36 Stat. 298.

§ 13. Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars

Any common carrier subject to sections 11-16 of this title using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of said sections not equipped as provided in said sections, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this title: *Provided,* That where any car shall have been properly equipped, as provided in sections 1-16 of this title, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this title, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of sections 1-16 of this title; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight. Apr. 14, 1910, c. 160, § 4, 36 Stat. 299.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,782

SOUTHERN RAILWAY COMPANY, *Appellant*,

v.

EARL N. BRYAN, *Appellee*.

Appeal from the United States District Court for the Northern District of Georgia

(April 3, 1967)

Opinion Below

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and BREWSTER, District Judge.

BREWSTER, District Judge: The railroad is appealing from a judgment rendered in favor of one of its employees in an action for damages for personal injuries brought under the Federal Employers Liability Act, 45 U. S. C. A. 51, alleging in separate counts a violation of the Boiler Inspection Act, 45 U. S. C. A. 23, and common law negligence.

The overall question presented here is whether the issue of liability under the count predicated upon the alleged violation of the Boiler Inspection Act was settled as a matter of law. Each party claimed that it was so settled in his favor. The trial court agreed with the employee, and the count on negligence was withdrawn. The court instructed the jury that the railroad was liable as a matter of law, and submitted to them only the issue as to amount of damages. The railroad insists that it was entitled to judgment as a matter of law on such count, and, in the alternative, that there were issues of fact both as to violation and as to proximate cause that made the action taken by the court reversible error. All

the controlling facts material to these questions here involved are undisputed.

On November 8, 1962, the locomotive and several cars of the railroad's passenger train, known as "The Southerner", were derailed and overturned in a collision at a crossing near Eastaboga, Alabama, while the train was enroute from Washington, D. C. to New Orleans. The locomotive came to rest on its side, roughly parallel to the tracks of the main line, but close enough to interfere with rail traffic thereon. It was gutted by fire to the extent that it was inoperative as a locomotive. Bryan, a carman, was a member of a crew that was sent to the scene to rerail the locomotive and cars so that they could be taken to the repair shops. The crew had two boom cars to lift the wrecked equipment back on the track. Cables from the boom cars were attached by means of a clevis to the lifting eye or metal bracket provided for that purpose on each end of the locomotive, so that the crane on one of such cars would be lifting the front while that on the other was raising the back. When the locomotive was off the ground, the cranes could maneuver it into position to be lowered to the tracks on its wheels. The employee, in accordance with instructions, attached one of the cables to the lifting eye on the back end of the locomotive, and then went to the other side of one of the boom cars to keep watch on its wheels to make certain that they did not raise up and come off the tracks during the lifting operation. The lifting could be done either by picking up the cables or by raising up on the booms of the derricks. The latter method, called "booming", was the one used on the occasion here involved. The lifting eye on the rear broke while the locomotive was suspended in the air, with the result that the loosened cable back-lashed and a piece of its attaching apparatus hit the employee across the back and injured him while he was down on his hands and knees watching the wheels of his boom car.

A careful consideration of the record has led us to the conclusion that we cannot agree with the railroad's contentions that it is not liable as a matter of law on the grounds that the locomotive was not in use on its line at the time of the injury, that it was exempt from liability during the movement of the locomotive from the point of disability to the nearest available point of repair, and that the lifting bracket was not a part or an appurtenance of the locomotive within the meaning of the Boiler Inspection Act. Where the hauling of a disabled or defective railroad vehicle is "in progress or in immediate contemplation", *McCalmont* v. *Pennsylvania Company,* 6 Cir., 283 F. 736, 739 (1922), the handling of it for that purpose is a part of its unitary journey from the point of discovery of disability to the repair shop. *Texas & P. Ry. Co.* v. *Rigsby,* 241 U.S. 33, 36 S. Ct. 482, 60 L. ed. 874 (1915), affirming, 5 Cir., 222 F. 221. The fact that the Boiler Inspection Act does not contain a reservation of remedial actions for personal injuries similar to the one in Section 13 of the Safety Appliance Act does not relieve the railroad from liability for injuries due to violations thereof during transportation of a locomotive from the point of discovery of a violation to the nearest place of repair. The reservation in Section 13 was made necessary because of a provision therein for exemption from civil penalties that has no counterpart in Section 23. Getting the locomotive back on the track in the event of derailment was an integral part of its use, and the metal eye designed to assist in that operation came within the broad language "all parts and appurtenances" of Section 23.

The trial court correctly instructed the jury that liability was established as a matter of law. *Givens* v. *M. K. & T. R. Co.,* 5 Cir., 195 F. 2d 225 (1952). Even if we were to agree with the railroad's argument that there was a fact issue as to the existence of a defect that caused the lifting bracket to break, there would still be no escape

from the fact that the bracket did not comply with the requirement of the Boiler Inspection Act that all parts and appurtenances of locomotives be "safe to operate in the service to which the same are put." The employee did not have to show the existence of a defect. His burden of establishing liability was discharged when it was proved that he suffered injuries as a proximate result of the failure of the lifting bracket to perform properly in an intended service for which it was being used. *O'Donnell* v. *Elgin, J. & E. R. Co.*, 338 U.S. 384, 70 S. Ct. 200, 94 L. ed. 187 (1949); *Affolder* v. *N. Y. Ch. & St. L. R. Co.*, 339 U.S. 96, 70 S. Ct. 509, 94 L. ed. 683 (1949); *Givens* v. *M. K. & T. Ry. Co., supra.* While the first two cases just cited involve violations of the Safety Appliance Act, the principle above announced by them applies with equal force to cases arising under the Boiler Inspection Act. All of the federal safety laws in Chapter 1, Title 45, U. S. C., are in *pari materia* and must be liberally construed in connection with the federal remedy provided in Chapter 2 of such title to carry out their remedial and humanitarian purposes. *Urie* v. *Thompson*, 337 U.S. 163, 192, 189, 69 S. Ct. 1018, 93 L. ed. 1282, 1299, 1302. The undisputed facts established the required causal connection between the violation of the Boiler Inspection Act and the employee's injuries under the test laid down by *Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. ed. 2d 493 (1957), and later cases cited by this Court in *Page* v. *St. L. S. W. Ry. Co.*, 5 Cir., 312 F. 2d 84 (1963).

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23782

D. C. Docket No. 9160-Civil Action

SOUTHERN RAILWAY COMPANY, *Appellant,*

v.

EARL N. BRYAN, *Appellee.*

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and BREWSTER, *District Judge.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, Southern Railway Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 3, 1967

Issued as Mandate: April 25, 1967